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Wasatch Bank, a Utah Banking Corporation v. Kevin B. Leany and Darleen J. Leany, husband and wife : Brief of Appellant

Utah Supreme Court

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Gary L. Chrystler; Attorney for Appellants.

S. Rex Lewis; Howard, Lewis and Petersen; Attorney for Plaintiff.

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DOCKET NO. 20624

THE SUPREME COURT

OF THE

STATE OF UTAH

---0000000---

WASATCH BANK, a Utah Banking
Corporation,

Plaintiff-Respondent,

-vs-

KEVIN B. LEANY and DARLEEN J.
LEANY, husband and wife,

Defendants-Appellants.

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Case No. 20624

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BRIEF OF APPELLANTS

---0000000---

Appeal from Judgment of the Fourth Judicial District Court, Utah County,
State of Utah, Honorable George E. Ballif, District Judge.

GARY L. CHRYSTLER
Attorney for Appellants
42 North University Avenue
Suite 4, P.O. Box 1045
Provo, Utah 84603
Telephone: (801) 375-3121

S. Rex Lewis
HOWARD, LEWIS & PETERSEN
120 East 300 North
P.O. Box 778
Provo, Utah 84603
Telephone: (801) 373-6345

THE SUPREME COURT

OF THE

STATE OF UTAH

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WASATCH BANK, a Utah Banking
Corporation,

:

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Plaintiff-Respondent,

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Case No. 20624

-vs-

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KEVIN B. LEANY and DARLEEN J.
LEANY, husband and wife,

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Defendants-Appellants.

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GARY L. CHRYSTLER
Attorney for Appellants
42 North University Avenue
Suite 4, P.O. Box 1045
Provo, Utah 84603
Telephone: (801) 375-3121

S. Rex Lewis
HOWARD, LEWIS & PETERSEN
120 East 300 North
P.O. Box 778
Provo, Utah 84603
Telephone: (801) 373-6345

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STATEMENT OF ISSUES PRESENTED ON APPEAL

Appellants raise the following issues for consideration on appeal:

1. Did the Trial Court err in finding that the fair market value of the trusted property, at the time of the Trustee's Sale, did not exceed the sum of \$34,000.00?
2. Did the Trial Court err in finding that Plaintiff, after Trustee's Sale, made repairs to the trusted real property in the sum of \$41,000.00?
3. Did the Trial Court err in failing to find that the repairs made by Plaintiff, after Trustee's Sale to the trusted real property in the sum of \$41,000.00, were reasonable and necessary?

STATEMENT OF THE CASE

Defendants purchased real property on December 23, 1980 and financed said purchase through Plaintiff. To facilitate the purchase and finance of their property, Defendants executed a promissory note in favor of the Plaintiff and likewise, executed a Trust Deed on said property in Plaintiff's favor wherein Plaintiff was named as Trustee and Beneficiary. Defendants failed to make payments pursuant to the terms of the note and Plaintiff declared Defendants' default and had the property sold at Trustee's Sale after which it sued Defendants for a deficiency. At trial on the issue of the deficiency, held on February 25, 1985, Plaintiff was awarded a Deficiency Judgment of \$30,466.91 together with costs in the sum of \$104.38. From this Judgment, Defendants appeal.

STATEMENT OF FACTS

Defendants, pursuant to the purchase of real property located in Payson, Utah, executed a Trust Deed and their promissory note in the sum of \$55,920.00,

in favor of Plaintiff, Wasatch Bank, on December 23, 1980. (P EXHIBIT 1; T 43: 16-19; R 46) Plaintiff was both Trustee and Beneficiary in said Trust Deed. (R 46) Defendants failed to make payments on the note as they became due and Plaintiff declared the entire balance due and payable pursuant to the terms of the note. (R 46) Plaintiff Noticed Defendants' default on May 18, 1983 (T 44: 14-25, 45: 1-7) and Noticed a Trustee's Sale for September 20, 1983. (R 46) At the Trustee's Sale, Plaintiff bid the sum of \$34,000.00 and purchased the property. (T 4: 9-11, 7: 9-11; R 46) Plaintiff alleges the fair market value of the trusted property at time of Trustee's Sale is \$34,000.00. (T 4: 9-11)

On October 23, 1983, Plaintiff brought suit against Defendants for a Deficiency Judgment of \$30,553.70 together with interest and attorney's fees. (R 1, 2, 3) At trial in this matter, Plaintiff's officer in charge of its real estate department, Leonel Castillo, testified. (T 5: 9-15) Plaintiff claims that on the date of the Trustee's Sale, September 20, 1983, the accrued principal balance due on the promissory note was \$55,390.84 (T 6: 14-22), that the accrued interest due as of the date of sale was \$5,768.61 (T 6: 23-25; 7: 1) and the costs of the Trustee's Sale were \$3,301.43. (T 7: 2-5) The total due by Defendants to Plaintiff at time of Trustee's Sale was \$64,466.91. (T 7: 6-8) Plaintiff resold the Payson property for the sum of \$31,500.00. (T 12: 7-8) Plaintiff claims that at the time of resale, the property was in the same condition as it was in at the time of the Trustee's Sale except for the fact Plaintiff while, it had possession of the premises, put on a new roof, replaced some broken windows, and installed new locks. (T 8: 25, 9: 1-18) Plaintiff also claimed that after resale of the property, the Plaintiff distributed the sum of \$41,107.00 for repairs to the property

(T 49: 2-8) and that the new owners put another \$2,000.00 of their own money into the premises for repairs. (T 49: 9-13)

Plaintiff's expert, Jud Harward, a professional real estate appraiser, next testified. (T 14: 1-8) Mr. Harward testified that he appraised the trusted property in May of 1984 (T 22: 6-8) and that he first inspected the property on May 18, 1984. (T 22: 9-10) Mr. Harward further testified his appraisal was not based upon his personal knowledge of the trusted property as of the date of the Trustee's Sale, September 20, 1983. (T 23: 10-13) Mr. Harward testified his appraisal was based upon pictures presented to him and upon statements made to him by other persons. (T 22: 23-25, 23: 1-9) Based upon the statements and pictures supplied to Mr. Harward regarding the condition of the trusted property, he placed an appraised value on said property of \$30,000.00 as of the date of the Trustee's Sale. (T 21: 9-12) Mr. Harward further testified that if the Payson property was repaired pursuant to a list of repairs given to him by Plaintiff, the appraised value of the property, in his opinion, would be \$80,000.00. (T 21: 2-5) Mr. Harward stated it was his opinion that the reasonable cost of the list of repairs would be \$50,000.00. (T 20: 3-23)

Defendants' expert, Don Gurney, a professional real estate appraiser, was called and testified. (T 24: 17-23) Mr. Gurney testified he had appraised the trusted property twice in the past at the request of Plaintiff, Wasatch Bank (T 26: 14-25) first on October 20, 1980 and again on August 25, 1983. (T 27: 1-4) Mr. Gurney testified that after an extensive review of the property and of comparables, he appraised the property at \$70,000.00 using the Market Data Approach and \$70,300.00 using the Replacement Analysis Approach in October of 1980. (T 27: 5-22) Mr. Gurney next testified that

as of August 25, 1983 he appraised the property at \$71,000.00 based on certain repairs being made. (T 27: 24-25, 28: 1-25, 29: 1-9) Finally, Mr. Gurney testified that based upon the list of repairs presented to him by Plaintiff, Wasatch Bank, (T 33: 7-25, 34: 1-10) the "as is" value of the property as of August 23, 1983, in his opinion, would be \$54,000.00. (T 32: 17-25, 33: 1-6) Mr. Gurney stated his "as is" value was based upon the assumption that the repairs on the list provided by Plaintiff were necessary; and in fact, Mr. Gurney stated he was unaware whether or not the repairs were reasonable and necessary or in fact made. (T 40: 16-22) Upon cross-examination, in response to questioning from counsel, Mr. Gurney stated that if Plaintiff actually spent \$50,000.00 on necessary repairs, he would agree with the appraisal of Jud Harward. (T 39: 8-14)

Kevin Leany, one of the Defendants, testified that before purchasing the trusted property, he extensively examined the property several times (T 45: 9-18) and determined that it was structurally sound. (T 45: 19-23) Mr. Leany also testified that subsequent to purchase of the property, \$5,000.00 of the loan proceeds from Plaintiff were used for repairs, carpeting, draperies, plumbing fixtures, and kitchen appliances. (T 46: 4-8, 17-20)

At the conclusion of evidence, the Court took the matter under advisement. (T 52: 13-15) The Trial Court found that the fair market value of the trusted property at time of sale, September 20, 1983, did not exceed Plaintiff's bid at sale of \$34,000.00. (R 47) The Trial Court further found that Plaintiff had paid bills amounting to \$41,000.00 for repairs to the trusted property and that \$2,000.00 was expended by the new purchasers for repairs. (R 47) The Court granted Judgment in favor of Plaintiff and against Defendants for the sum of \$30,466.91 together with costs of \$104.38. (R 47)

SUMMARY OF ARGUMENT

The Trial Court erred in granting Plaintiff Judgment in the sum of \$30,466.91 together with costs of \$104.38 in that there was no evidence offered at all to indicate the list of repairs paid for by Plaintiff were in fact made, and if made, that said repairs were reasonable and necessary.

ARGUMENT

POINT ONE

THE TRIAL COURT ERRED IN FINDING THAT THE FAIR MARKET VALUE OF THE TRUSTED PROPERTY, AT TIME OF SALE, DID NOT EXCEED THE SUM OF \$34,000.00 AND THAT PLAINTIFF MADE NECESSARY REPAIRS TO SAID PROPERTY IN THE SUM OF \$41,000.00.

Plaintiff's expert witness, Jud Harward, appraiser, testified he did an appraisal on the trusted property in May of 1984, (T 22: 6-8) eight months after the Trustee's Sale. Mr. Harward also testified that his appraisal was not based on his personal knowledge of the condition of the trusted property on the date of Trustee's Sale (T 23: 10-13), but rather upon pictures presented to him and upon statements made to him by other persons. (T 22: 23-25, 23: 1-9) No testimony whatsoever was offered regarding the credibility of the pictures nor did the "others" from whom Mr. Harward obtained statements and information regarding the condition of the trusted property at time of sale testified. Mr. Harward testified that based upon the information at his disposal regarding the condition of the trusted property on the date of the Trustee's Sale, none of which was personal knowledge, repairs would cost \$50,000.00. (T 20: 3-23) Mr. Harward further testified that the potential value of the trusted property, in his opinion, was \$80,000.00 (T 21: 2-5) and, therefore, the "as is" value of the trusted property at date of sale was \$30,000.00. (T 21: 9-12)

Defendants' expert witness, Don Gurney, an appraiser, testified he had conducted two appraisals on the trusted property at the request of Plaintiff. (T 26: 14-25) The first appraisal was performed on October 20, 1980, prior to Defendants' purchase of the property, and the second appraisal was performed on August 25, 1983, just prior to the Trustee's Sale. (T 27: 1-4) Mr. Gurney testified he was given a list by Plaintiff of certain repairs which Plaintiff felt needed to be made to the trusted property. (T 33: 7-25, 34: 1-10) Mr. Gurney testified it was his opinion, based upon his inspection of the trusted property and upon the list of repairs provided him by Plaintiff, that the "as is" value of the property at time of sale was \$54,000.00 (T 32: 17-25, 33: 1-6) Mr. Gurney further testified it was his opinion that the potential value of the trusted property was \$71,000.00. (T 27: 24-25, 28: 1-25, 29: 1-9) Mr. Gurney finally testified that his "as is" value of the trusted property was based upon the assumption that the list of repairs supplied to him by Plaintiff were reasonable and necessary; but in fact, he had no personal knowledge as to whether the repairs were made and if made, whether they were reasonable and necessary. (T 40: 16-22)

Mr. Castillo, Plaintiff's witness, testified that Plaintiff actually disbursed \$41,107.00 for repairs (T 49: 6-8) and that the new owners spent an additional \$2,000.00 for repairs after purchase. (T 49: 9-13) Plaintiff offered no evidence as to the exact nature of the alleged repairs made and there was no testimony whatsoever as to whether or not the repairs allegedly made were reasonable and necessary. Section 57-1-32, Utah Code Annotated (1953 as amended, see Addendum for text of statute) contemplates in finding the fair market value of trusted property, all charges made against the property be, first, actual and verifiable as opposed to merely speculative in nature, and second, reasonable and necessary.

Plaintiff has the burden of establishing the fair market value of the trusted property at time of sale. All evidence of the fair market value of the property offered and received at trial was speculative in nature--based upon a list of repairs compiled by Plaintiff, and which Plaintiff did not even claim were reasonable and necessary. Plaintiff could have had repairmen testify as to what was actually done to the trusted property, when these things were done to the trusted property and whether or not the repairs were reasonable and necessary; it did not. Rather, Plaintiff asked the Court to assume what it did to the trusted property, whatever that was, was not only reasonable but necessary merely because Plaintiff asserted in a conclusatory fashion that it was.

CONCLUSION

Defendants respectfully petition for an Order on Appeal overruling the Court below and specifically finding that there was insufficient evidence presented to support the Trial Court's finding the fair market value of the trusted property, at time of sale, did not exceed \$34,000.00 and that Plaintiff made reasonable and necessary repairs to said property in the sum of \$41,000.00 prior to resale.

GARY L. CHRYSTLER
Attorney At Law

MAILING CERTIFICATE

I hereby certify that I served the foregoing Appellants' Brief by mailing four true and exact copies thereof, postage prepaid, to:

S. Rex Lewis, Esq.
HOWARD, LEWIS & PETERSEN
P.O. Box 778
Provo, UT 84603

DATED this 18th day of September, 1985.

GARY L. CHRYSTLER
Attorney At Law

ADDENDUM

Addendum 1: Memorandum Decision of Trial Court

Addendum 2: Findings of Fact and Conclusions of Law of Trial Court

Addendum 3: Judgment of the Trial Court

Addendum 4: Section 57-1-32, Utah Code Annotated (1953 as amended)

ADDENDUM 1

IN THE FOURTH JUDICIAL DISTRICT COURT OF UTAH COUNTY

STATE OF UTAH

WASATCH BANK, a Utah banking
corporation,

Civil No. 65118

Plaintiff,

vs.

D E C I S I O N

KEVIN B. LEANY and DARLENE
J. LEANY, husband and wife,

Defendants.

This matter was tried to the Court on the 25th day of February, 1985, S. Rex Lewis, Esq., appearing for the plaintiff and Gary L. Chrystler, Esq., for the defendants. The parties presented their evidence, and the Court having taken the matter under advisement, now enters its:

DECISION

The Court finds the issues herein in favor of the plaintiff Wasatch Bank, and against the defendants and find that the fair market value of the real property at the time of the trust deed sale did not exceed \$34,000.00 as alleged in the Complaint. The Court further find that the total amount due on the promissory note, including the principal balance, accrued interest and cost of sale total \$64,466.91, and that the plaintiff herein bid the sum of \$34,000.00 at the trust deed sale and is therefore entitled to a Deficiency Judgment against

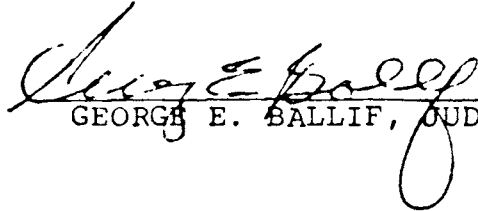
ADDENDUM 1 CONTINUED

the defendants for the sum of \$30,466.91.

The evidence presented by the Appraiser, Jud Harward, was the most realistic, and which the Appraiser Gurney agreed with upon verification of the cost of repair items which were substantially as represented by Harward upon verification by the witness, Castillo, who had paid bills from the bank to repair the property in the sum of \$41,000.00 expended by the bank and \$2,000.00 by the buyer.

Counsel for the plaintiff is directed to prepare appropriate Findings of Fact, Conclusions of Law and Deficiency Judgment in accordance with the foregoing Decision.

Dated at Provo, Utah County, Utah, this 26th day of February, 1985.



GEORGE E. BALLIF, JUDGE

S. REX LEWIS, for:
HOWARD, LEWIS & PETERSEN
ATTORNEYS AND COUNSELORS AT LAW
120 East 300 North Street
P.O. Box 778
Provo, Utah 84603
Telephone: (801) 373-6345

ADDENDUM 2

Our File No. 9473

Attorneys for Plaintiff

IN THE FOURTH JUDICIAL DISTRICT COURT OF UTAH COUNTY
STATE OF UTAH

| | | |
|-----------------------------|---|----------------------|
| WASATCH BANK, a Utah | : | |
| Banking Corporation, | : | |
| | : | |
| Plaintiff, | : | FINDINGS OF FACT AND |
| | : | CONCLUSIONS OF LAW |
| vs. | : | |
| | : | |
| KEVIN B. LEANY and DARLENE | : | |
| J. LEANY, husband and wife, | : | |
| | : | |
| Defendants. | : | Civil No. 65,118 |

The above-entitled matter came on for trial before the above-entitled Court on February 25, 1985 without a jury. The plaintiff appeared by its counsel, S. Rex Lewis of Howard, Lewis & Petersen. The defendant, Kevin B. Leany, appeared in person and both defendants were represented by their counsel, Gary L. Chrystler. The Court having heard the evidence, both oral and documentary, and being fully advised in the premises and having taken the matter under advisement, now makes the following:

FINDINGS OF FACT

1. The plaintiff is a corporation authorized and qualified to do banking business in the State of Utah
2. On the 23rd day of December, 1980, the defendants made and executed a

promissory note in the sum of \$55,920.00 payable to the plaintiff Wasatch Bank. A copy of the promissory note is attached to the complaint as Exhibit 1.

3. The aforesaid defendants failed to make the payments as they became due pursuant to the terms of said promissory note and the entire principal amount outstanding, together with accrued interest, became due and payable. As of September 20, 1983, there was due, owing and unpaid the principal sum of \$55,396.87 together with interest as of September 20, 1983 in the sum of \$5,769.81. On that same date there was accrued as costs and expenses of exercising the power of sale and the sale in the amount of \$3,382.22. On September 20, 1983 the defendants were entitled to a credit against the amount due and owing of the sum of \$34,000.00 paid pursuant to a trustee's sale. Interest has accrued on the unpaid balance as of September 20, 1983 as in said note provided. Plaintiff has heretofore elected to declare the entire balance on said promissory note due and payable.

4. On the 23rd day of December, 1980 the defendants, as trustors, executed a deed of trust wherein Wasatch Bank was the trustee and beneficiary, which deed of trust was given to secure the aforesaid promissory note and which deed of trust was recorded on December 23, 1980 as Entry No. 44090 in Book 1884 at Page 911, a copy of which deed of trust is attached to the complaint as Exhibit 2.

5. Plaintiff has heretofore, pursuant to the power of sale contained in said deed of trust, effected a trustee's sale of the said deed of trust, which sale was conducted on September 20, 1983. Plaintiff bid the sum of \$34,000.00 at the aforesaid sale.

6. The fair market value of the said real property at the time of said sale did not exceed the sum of \$34,000.00 as alleged in the complaint. After applying the bid price of \$34,000.00, the plaintiff is entitled to a deficiency judgment against the defendants for the sum of \$30,466.91.

7. The evidence presented by the appraiser, Jud Harward, was the most realistic and which the appraiser Gurney agreed with upon verification of the cost of repair items which were substantially as represented by Mr. Harward and which were verified by the witness, Leonel Castillo, who had paid bills from the bank to repair the property in the sum of \$41,000.00 expended by the bank and \$2,000.00 expended by the new purchaser.

From the foregoing Findings of Fact, the Court now makes the following:

CONCLUSIONS OF LAW

1. The plaintiff is entitled to judgment against the defendants and each of them for the sum of \$30,466.91, together with its costs in the sum of \$104.38.

Let judgment be entered accordingly.

DATED this 26th day of March, 1985.

BY THE COURT:

151
GEORGE E. BALLIF
District Court Judge

Approved as to form:

151
GARY L. CHRYSTLER
Attorney for Defendants

MAILING CERTIFICATE

I hereby certify that a true and correct copy of the foregoing was mailed to
the following, postage prepaid, this 20 day of March, 1985:

Mr. Gary L. Chrystler
Attorney for Defendants
P.O. Box 1045
Provo, Utah 84603

[Signature]
SECRETARY

**S. REX LEWIS, for:
HOWARD, LEWIS & PETERSEN
ATTORNEYS AND COUNSELORS AT LAW**

120 East 300 North Street
P.O. Box 778
Provo, Utah 84603
Telephone: (801) 373-6346

Our File No. 9473

Attorneys for Plaintiff

IN THE FOURTH JUDICIAL DISTRICT COURT OF UTAH COUNTY

STATE OF UTAH

WASATCH BANK, a Utah
Banking Corporation,

Plaintiff,

vs.

KEVIN B. LEANY and DARLENE
J. LEANY, husband and wife,

Defendants.

:
:
:
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:
:

JUDGMENT

Civil No. 65,118

The above-entitled matter came on for trial before the above-entitled Court on February 25, 1985 without a jury. The plaintiff appeared by its counsel, S. Rex Lewis of Howard, Lewis & Petersen. The defendant, Kevin B. Leany, appeared in person and both defendants were represented by their counsel, Gary L. Chrystler. The Court having heard the evidence, both oral and documentary, and being fully advised in the premises, having taken the matter under advisement, and having made its Findings of Fact and Conclusions of Law herein,

IT IS HEREBY ORDERED AND ADJUDGED AS FOLLOWS:

1. The plaintiff, Wasatch Bank, is hereby awarded judgment against the defendants, Kevin B. Leany and Darlene J. Leany, in the sum of \$30,466.91, together with plaintiff's costs in the sum of \$104.38.

2. The foregoing judgment will bear interest at the rate of 12% per annum until paid.

DATED this 26th day of March, 1985.

BY THE COURT:



GEORGE E. BALLIF
District Court Judge

Approved as to form:

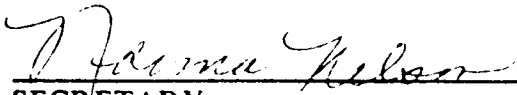


GARY L. CHRYSTLER
Attorney for Defendants

MAILING CERTIFICATE

I hereby certify that a true and correct copy of the foregoing was mailed to the following, postage prepaid, this 20 day of March, 1985:

Mr. Gary L. Chrystler
Attorney for Defendants
P.O. Box 1045
Provo, Utah 84603



SECRETARY

ADDENDUM 4

Sale of trust property by Trustee--action to recover balance due upon obligation for which Trust Deed was given as security.

At any time within three months after any sale of property under a Trust Deed, as hereinabove provided, an action may be commenced to recover the balance due upon the obligation for which the Trust Deed was given as security, and in such action the Complaint shall set forth the entire amount of the indebtedness which was secured by such Trust Deed and the amount for which said property was sold and the fair market value thereof at the date of sale, together with interest on such indebtedness from the date of sale, the costs and expenses of exercising the power of sale and of the sale. Before rendering Judgment, the Court shall find the fair market value at the date of sale of the property sold. The Court shall not render Judgment for more than the amount by which the amount of the indebtedness with interest and the costs and expenses of sale, including Trustee's and attorney's fees, exceed the fair market value of the property or interest therein sold as of the date of the sale, and in no event shall the amount of said Judgment, exclusive of interest from the date of sale, exceed the difference between the amount for which the property was sold and the entire amount of the indebtedness secured thereby, including said costs and expenses of sale. §57-1-32, Utah Code Annotated (1953 as amended).